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No. 84-1554

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner

v.

CLIFFORD W. CARRIER,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether this Court should overrule the holding of Wainwright v. Sykes which held that a federal court may reach the merits of a constitutional issue on habeas corpus (other than the issue of ineffective assistance of counsel) by a showing of "cause" to remove the barrier of failure of counsel in state court to preserve the issue.

II. Whether Virginia law provides a remedy for a prisoner to exhaust when he alleges attorney error as "cause" under Wainwright v. Sykes in seeking to reach the merits of a constitutional issue, and not attorney error as an independent denial of due process by establishing ineffectiveness of counsel.

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STATEMENT OF THE CASE

Virginia's Statement of the Case is not incorrect but may mislead the reader as to the actions taken by Carrier's attorney at the state court trial on the rape charges and on direct appeal as well as actions and litigation posture taken by his present counsel in the U.S. Court of Appeals for the Fourth Circuit after federal habeas corpus was denied.

At respondent's 1977 rape trial in Virginia court he was twice denied discovery of the prosecutrix' statements to police describing the crime on the theory, expressly articulated by the trial court, that a defendant has a right to examine only "exculpatory" material in the possession of

the prosecution. There is no dispute that the trial court erred. The proper test under the due process clause in cases where a defendant specifically describes the evidence at issue is whether the judge finds it "material" on the issue of guilt. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 106 (1976).

Defense counsel carefully preserved objections in the trial court, and his notice of appeal to the Virginia Supreme Court alleged that refusal to permit inspection of the prosecutrix' statement was reversible error. Counsel did not brief the issue on appeal, however, and thus it was lost as a matter of Virginia law.

The prisoner Carrier, in pro se documents filed in the U.S. district court, contended that this failure to brief was "eneffective [sic] assistance of counsel."

It is important to observe that Virginia concedes (Petn. for Cert., p. 4, at top) what the records shows: that Carrier made the allegation of ineffective assistance of counsel in U.S. District Court as a basis for cause to excuse the procedural default and not as an independent due process violation that would require vacating his conviction. Carrier made the allegation in a "Motion of

Objection and Exception" (4th Cir. App.* pp. 83-84) he submitted in response to a recommendation of a magistrate that he had not shown "cause" under Wainwright v. Sykes, 433 U.S. 72, 84 (1977), to avoid the consequences of the procedural default in state court.

The question whether there was attorney error of such magnitude as to independently establish a due process violation under Strickland v. Washington, 104 S. Ct. 2052 (1984) has never been presented in this case. In arguing the "cause" issue under Wainwright on appeal, appointed counsel initially contended that the record showed such an egregious error as would meet the strict due process test. (Cert. App. pp. 23-25). The certiorari petition says (p. 4, n. 3) the "Sixth Amendment claim was expressly abandoned in oral argument in the Court of Appeals below." That is correct insofar as what we abandoned was the contention that the record showed on its face such serious attorney error as

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*This abbreviation is used to refer to the joint appendix filed by the parties in the U.S. Court of Appeals for the Fourth Circuit upon appeal of the district court order denying habeas corpus relief. The abbreviation Cert. App. will be used to refer to the "Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit" filed by Virginia with this Court.

would independently (of the Brady claim) be a basis for relief.*

It is also important to observe that Carrier has at no time contended that he was not required to exhaust in Virginia courts any remedy provided there involving an allegation of ineffective assistance of counsel. See Appellant's Opening Brief (in the U.S. Court of Appeals for the Fourth Circuit) at pp. 16-24. Obviously, if this court holds that Carrier cannot benefit under Wainwright v. Sykes by a showing of attorney error that does not meet the tough Strickland test, he must return to state court. The Strickland issue has not been presented there, and we know that Virginia will follow the federal definition of "ineffective assistance of counsel" (Brief of Appellee in the Fourth Circuit, appendix at A).

But Virginia courts are not required to grant habeas corpus relief in every situation where a federal court would. Virginia is free to reject Wainwright and to hold

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*As advocates for Carrier, appointed counsel have never conceded that, were Carrier to allege ineffective assistance of counsel as an independent basis for relief, he could not prove a case under that theory. It is possible that an evidentiary hearing might show an almost wilful abandonment of the winning argument on direct appeal stemming from counsel's anger at Carrier. In any event, since the Strickland issue has never been presented in any pleading in this case, nothing counsel said at oral argument in the Court of Appeals for the Fourth Circuit should prejudice Carrier if he is able subsequently to allege a claim for relief under Strickland.

that there can be no showing of cause in state habeas corpus proceedings to excuse the procedural default that would enable the court to reach the merits of the Brady issue. Carrier has asserted that Virginia does not recognize such "cause" in the form of attorney error that does not meet the Strickland test. If Virginia did, there would be, as Carrier has always conceded, a state remedy that he not exhausted.

Because no evidentiary hearing was held in federal district court and because the indigent Carrier was not represented by counsel until appeal to the Fourth Circuit, the record is completely barren both of specific allegations concerning how the attorney error occurred and, of course, any evidence related to that issue. In the court below Virginia argued that it would be able to establish that Carrier's defense counsel made a deliberate, tactical choice to drop a Brady-based argument on appeal, which would preclude a finding of "cause" under Wainwright v. Sykes no matter what test was used:

> His counsel may well have known the contents of the victim's statements and may have thought that failure by the Trial Court to permit him to review them were [sic] inconsequential. He may have felt that to eliminate that claim from his Petition for a Writ of Error and to concentrate on others might give him a better chance to secure a Writ in the Supreme Court of Virginia. There are a myriad of explanations which may be advanced as to why Petitioner's counsel did not raise on appeal the issue.

Brief of Appellee (in the U.S. Court of Appeals for the Fourth Circuit) at p. 8.

REASONS FOR DENYING CERTIORARI

I. The Record Is Insufficient for Testing the Continued Viability of the Wainwright v. Sykes "Exception" to the Rule That Procedural Default in State Court Bars Review in Federal Habeas Corpus.

The holding of the majority of the Fourth Circuit en banc in this case is quite narrow: it is only that there must be "some circumstances" (Cert. App. 2) in which attorney error that is not independently a basis for habeas relief constitutes "cause" under Wainwright v. Sykes, allowing a court to proceed to the merits of the constitutional claim (which is not ineffective assistance of counsel). The court certainly does not hold, as Virginia suggests (Petn. for Cert. p. 9), that any case of attorney negligence or ignorance satisfies the Sykes "cause" requirement. The en banc majority refers favorably to the majority opinion of the Fourth Circuit panel in Carrier's case. It, too, holds only that there may be some circumstances where attorney error insufficient to qualify for relief under Strickland constitues Sykes "cause." The panel gave as an illustrative example a case where counsel "fails to exercise it [judgment] at all in dereliction of the duty to represent her client." (Emphasis added.)

Because there had been no evidentiary hearing in Carrier's case on the issue of why counsel abandoned the winning Brady argument on appeal, the court below was unable to formulate a definitive rule as to when non-Strickland error satisfies the Sykes test. One sees, however, from the

panel's example of an attorney who utterly fails to exercise judgment, that the court has in mind quite a serious error and by no means a rule for the Fourth Circuit that ignorance alone constitutes Sykes cause.

If certiorari is denied, the district court will be guided on remand by the panel opinion's qualification and the limitations of the en banc majority's narrow holding. It may well be, as Virginia has claimed, counsel's decision was tactical; or there may be error or ignorance not sufficiently serious to qualify as "cause." Certainly it is premature in Carrier's case for this court to clarify the meaning of "cause" under Sykes, since there is not yet a factual record on which to test various verbal formulations nor a specific holding of a lower court as to what type of error constitutes such "cause." Certiorari should be denied when there is an absence of facts on which to base a decision. See, e.g., Massachusetts v. Painter, 389 U.S. 560, 561 (1967) (certiorari dismissed because record not clear enough to permit decision of important constitutional issue); Gilbert v. California, 388 U.S. 263, 269 (1967) (certiorari dismissed when record revealed facts did not appear with sufficient clarity to decide issue).

True, a much broader issue is presented: whether the Sykes doctrine should simply be abolished. Although

Virginia tries to obsfucate things,* that is precisely what it is asking the Court to do. This Court in Sykes held that the cause-prejudice test laid out there was an "exception" (433 U.S. at 90) to a general rule that procedural default in state court barred federal habeas corpus relief; an exception that

> will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas corpus court from adjudicating the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. [Id. at 91.]

Clearly, the "constitutional claim" referred to is the claim allegedly lost due to procedural default. In Sykes the voluntariness of a confession under Jackson v. Denno, 378 U.S. 368 (1964) was at issue; in the case at bar it is a Brady issue. Put under the rule advanced by Virginia and the dissent below, the habeas court would never reach the merits of such constitutional claims. To establish "cause" to avoid the consequences of procedural default would ipso facto establish a Strickland denial of counsel and relief would be granted on that basis. That would be to overrule the above-quoted passage of Sykes. While Virginia ignores this paradox (defining "cause" in Sykes so as to eliminate the very rule for which the concept is to be used), the

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*See, e.g., Petn. for Cert. p. 9 contending that it is the majority view below that renders Sykes "virtually meaningless" when, as noted in this brief, the majority view is essential if Sykes is to remain viable doctrine.

amici curiae led by the attorney general of North Carolina face up to it. They contend that adoption of Virginia's position would not swallow up the "exception" carved out in Sykes because cause could still be found in "governmental prevention" and "failure to honor the procedural ground relied on." Brief of Amici Curiae for Petitioner on Behalf of the State of North Carolina, etc., at p. 4.

The amici err. If a state government applied coercion to a defendant to force him to waive a constitutional right in state proceedings, the aggrieved prisoner would surely be entitled to federal habeas corpus relief. There would not be the situation envisioned in the quoted passage from Sykes where the federal court, after finding cause, proceeds to address the merits of a different constitutional issue. Rather the situation would be like that which Virginia wants applied to the case at bar where the very proof of what is called "cause" under Sykes turns out to entitle the prisoner to relief without any additional consideration of fact or law by the court.*

As for "failure to honor," Carrier assumes the amici have in mind a case like NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). There it was alleged that the right to pursue a constitutional claim had been lost in state appellate court because the party proceeded by way of

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*I.e., just as Strickland error by counsel violates due process so would "governmental prevention."

certiorari rather than mandamus. A state court had so held but examination of published precedents showed that certiorari had been an authorized mode of review in similar cases. This court went to the merits. In such a case the ultimate holding is not that "cause" to excuse a procedural default has been shown, but that there was no procedural default.

Accordingly, the amici as well as Virginia are unable to explain how the dissenting view below in this case will not result simply in abolishing the Sykes doctrine, with the "exception" emphasized there being swallowed up by the general rule of no review in federal court.

Even if the overruling of Sykes is something this Court wishes to consider, this case is not an appropriate vehicle for doing so -- at least not yet. Whether Sykes is unworkable should be decided in the context of a record containing facts that illustrate the type of attorney error that could be held to constitute Sykes "cause" but not Strickland error. As Virginia correctly contended in the lower court, there are "myriads" of possible reasons why counsel acted in a manner that is now attacked as erroneous. (Brief, supra, at 8). By asking for a certiorari grant at this stage of the proceedings prior to an evidentiary hearing, it is Virginia that is, in its own words, "ask[ing] us to leap into the unknown."

II. One Circuit's Disagreement With the Holding Below Is Not Sufficient Reason for Granting Certiorari.

Virginia contends (Petn. for Cert. at 9-10) that decisions in the Second, Sixth and Eighth Circuits conflict. The Sixth and Eighth circuit cases cited are typical of many that have held that simple negligence or oversight by counsel does not constitute Sykes cause. These circuits have not considered considered the issue whether there could be a more serious attorney error which would qualify as "cause" under Sykes but not be so egregious as to call for relief under Strickland. These circuits are quite consistent with the panel opinion in the case at bar which agreed that not all attorney error would be "cause" under Sykes.

The second circuit case cited, Tsirizotakis v. LeFevre, 736 F.2d 57, cert. den. 105 S. Ct. 216 (1984), does contain language inconsistent with the holding below but it is obvious that the court there failed to see the significance of that language. The prisoner there wished to constitutionally attack a charge to the jury and urged ineffectiveness of counsel as Sykes cause for avoiding the consequences of failing to object in state court. Immediately after citing Sykes the second circuit panel said it would be "reviewing petitioner's ineffective assistance of counsel claim under the Supreme Court's recent decision in Strickland v. Washington . . . ." 746 F.2d at 61. It then said the district court had correctly held that the conduct of counsel "constituted neither cause for the

procedural defaults nor independent constitutional violations warranting a grant of habeas corpus." Id.

Tsirizotakis thus failed to see that if Strickland principles alone were utilized in assessing alleged attorney error the issue of Sykes cause would vanish. The entire discussion consists of one paragraph of 20 1/3 lines.

The amici contend that the Fifth Circuit has sub silentio overruled decisions concededly in agreement with the majority in the case at bar. (Amici Brief at p. 4, n. 1). This is incorrect. Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981) says that a showing of "plain error" by counsel is not enough to establish cause under Sykes. There had to be some explanation made by the prisoner of the apparent error in failing to make an objection. "Hence," the Tyler court concluded, "the requisite showing of cause has not been made . . . ." Id. at 1101. The implication is that it would be possible to make a showing of cause based on attorney error that would lead the court to examine the merits of the constitutional issue, there the correctness of a jury charge on presumptions, rather than a showing that would result in granting habeas relief because of ineffective assistance of counsel.

Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981) likewise holds only that mere proof of a failure to object, with no explanation, would not establish Sykes "cause." Like Tyler, it is pregnant with the implications that a more substantial showing of attorney error would have led the

court to reach the merits of the constitutional issue involved there.

The panel opinion below indicates that not only the Fifth, Sixth and Eighth circuits (already discussed above) but also the Ninth and Tenth circuits agree with its view that it is possible for a prisoner to prove a serious attorney error that would not entitle him to relief under Strickland but would establish Sykes "cause." Since the panel decision the Seventh Circuit has expressed its agreement, in Clay v. Director, Juvenile Division, Dept. of Corrections, 749 F.2d 427 (7th Cir. 1984).

In sum, although there is a technical conflict in the circuits because of Tsirizotakis, the one contrary decision contains no analysis and is at odds with the approach in every other circuit. One maverick decision to the contrary should not make a well-analyzed, mainstream decision cert-worthy.

III. There is no Virginia Remedy to Exhaust.

Under 28 U.S.C. § 2254(b), "the remedies available in the courts of the State" must be exhausted. But it is only to the extent of "the question presented" in the federal habeas corpus action that exhaustion is required. 28 U.S.C. § 2254(c). The "Question" in our case is whether there was Brady error. Under § 2254(c) the fact that Carrier might be able to raise a different question if he wished to do so -- seeking relief directly under Strickland -- does not require

him to submit a Strickland claim to a state court before pursuing a Brady claim in federal court.

The panel quite correctly held that the question of what constitutes "cause" under Sykes is for federal courts alone and not part of what Carrier had to exhaust in state court.

As indicated above, Carrier has always conceded that if Virginia recognized as cause for excusing procedural default the same type of attorney error that federal courts do under Sykes, there would be a failure to exhaust in this case. In his opening brief in the Fourth Circuit, Carrier contended that any allegation of attorney error as such cause in the state proceedings would have been futile. Brief, p. 16. The only kind of attorney error Virginia recognized at the time was representation so ghastly as to render the trial as a whole a farce and mockery. Id., p. 17.

In reply Virginia cited an unpublished Virginia Supreme Court opinion following the Fourth Circuit's definition of ineffective assistance of counsel in the context of a sixth or fourteenth amendment claim based on lack of representation. Brief of Appellee (in the U.S. Court of Appeals for the Fourth Circuit) at p. 10 and Appendix, containing the 1983 opinion of Turner v. Morris. All this reply establishes is that if Carrier wished to pursue a Strickland claim in federal court he had a remedy to exhaust in Virginia, since it was now going to follow federal law on

habeas corpus in this regard rather than denying a remedy and remitting the state prisoner directly to federal court.

A Virginia court would not reach the Brady "question presented" here; if serious attorney error appeared to satisfy its Turner-Morris test, it would grant relief on that basis. If a lesser showing were made it would dismiss the petition for procedural default.

The Commonwealth attorneys have well understood Carrier's challenge in his opening brief to show what kind of a remedy he had in state court that would involve the state court considering his Brady claim. The reply brief below studiously avoids adverting to that and instead invites Carrier to try a Turner claim. The certiorari petition is similar. Not once is it suggested that Virginia has a remedy by which Carrier can get relief by pleading Brady coupled with an attorney error allegation presented as cause to avoid the consequences of procedural default.

Indeed, the only authority even hinting that Virginia would recognize a "cause" concept of attorney error when direct relief on the ground of ineffective assistance of counsel ground was unavailable was a federal district court opinion. Washington v. Downes, 475 F. Supp. 573 (E.D. Va. 1975), that had to be overruled by the court below in the

instant case because it was unsupportable.* Cert. App. 15 n. 9.

The result below does not conflict with Alcorn v. Smith, 724 F.2d 37 (6th Cir. 1983)*

In Alcorn, on the other hand, the Sixth Circuit surveyed Kentucky habeas corpus law and concluded that pursuing a Sykes style "cause" would not be futile. 724 F.2d at 40.

The scope of Virginia law was fully debated below. Judge Hall in his panel dissent thought Washington v. Downs, supra, was correct in predicting that Virginia would recognize a "cause" concept based on attorney error not serious enough to authorize relief on a theory of ineffective assistance of counsel. Challenged by Carrier to produce any authority in support of Washington v. Downs, the commonwealth attorneys were unable to do so. The state on

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*Just why Washington was overruled is unclear in view of the panel majority's footnote 8 to the effect that it would not decide what remedies Virginia offered. Washington was correctly decided if in fact Virginia law is identical to the federal law developed under Sykes. It would appear that notwithstanding footnote 8, the panel majority had to have examined Virginia habeas corpus law. Of course, the reasoning of the en banc majority below is even more unclear since it did not specifically adopt the majority panel opinion but stated merely that it agreed with its reasoning on the issue of defining "cause" under the Sykes case. The en banc majority never even refers to the panel's discussion of exhaustion.

*In Alcorn certiorari was granted, 53 U.S.L.W. 3617. On May 13, 1985, judgment was vacated and the cause remanded for consideration of representations that the prisoner had in fact exhausted in Kentucky courts the matters the Sixth Circuit Court of Appeals was telling him he still had to exhaust. 53 U.S.L.W. 3807.

rehearing had a second chance to show there was some remedy for Carrier to exhaust in pursuing his Brady claim, but a majority of the court en banc was not convinced.

In any event, surely this Court has more pressing business to attend to than determining whether Virginia has a body of law analogous to the federal "cause" doctrine under Sykes. Granting certiorari seems especially inappropriate when the commonwealth attorneys both below and in the certiorari petition are unable to point to any clue that such a body of state law exists.

CONCLUSION

For the foregoing reasons, respondent Carrier prays that certiorari be denied.

June 5, 1985.

Respectfully submitted,

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I certify that on this date copies of the above Memorandum were mailed, postage prepaid, to:

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